No. SC85582

IN THE
SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI,

Appellant,

vs.

LESLIE A. BROWN,

Respondent

Appeal from the Circuit Court of Greene County,
Missouri, Division No. V
Honorable Calvin R. Holden, Judge

APPELLANT'S REPLY BRIEF

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Argument

Jurisdiction

Respondent Brown argues that this Court is without jurisdiction to hear this case because Missouri law, specifically §547.200 RSMo., does not provide for this appeal. In support of her argument, Respondent cites Section 1 without reference to Section 2, which provides:

> "The State, in any criminal prosecution, shall be allowed an appeal in the cases and under the circumstances mentioned in section 547.210 and in all other criminal cases except in those cases where the possible outcome of such an appeal would result in double jeopardy for the defendant. The supreme court shall issue rules governing such appeals."

In addition, Article V, Section III of the Constitution of Missouri provides for exclusive jurisdiction with this Court

> "...in all cases involving the validity of a treaty or statute of the United States, or of a statute or provision of the constitution of this state...."

In her alternative argument, Respondent asserts that the Notice of Appeal was untimely in that it was filed six days after the entry of the order dismissing the State's information in this case. Subsection 4 of §547.200 requires that notice of appeals under Subsection 1 must be filed within five days. The State's appeal in

this case, however, because it does not proceed under Subsection 1 but under Subsection 2, is covered under Supreme Court Rule 30.01(d) which provides for ten days to appeal. Even if we were to accept, *arguendo*, the Respondent's five day limitation, Supreme Court Rule 44.01 provides that

> "In computing any period of time prescribed or allowed by these rules, by order of court or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless
>
> it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither Saturday, Sunday, nor a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation."

In this case, the fifth day was Sunday, September 14th, 2003. According to the rule, the time would have been extended at least through the 15th. If both Saturday and Sunday are excluded from the calculation as provided by the rule, the fifth day would have been on Tuesday, the 16th of September. The Appellant's Notice of Appeal was timely filed by any proper calculation.

Scienter

Respondent argues that Appellant's cited cases, specifically, *State v. Hurd,* 400 N.W.2d 42 (Wis.App. 1986), *People v. Cavaiani,* 432 N.W.2d 409 (Mich.App. 1988), and *Morris v. Texas*, 833 S.W.2d 624 (Tex.App. 1992) are distinguishable from the case at issue because there is no scienter requirement under Missouri law. On the contrary, §562.021.3 RSMo. provides that

> "...if the definition of any offense does not expressly prescribe culpable mental state for any elements of the offense, a culpable mental state is nonetheless required and is established if a person acts purposely or knowingly."

In this case, the Information charges that Respondent "knowingly failed to report" to the Division of Family Services. Respondent concedes in her brief that "the addition of a mens rea requirement gives Michigan's law greater protection and inoculation from vagueness attacks." (Respondent's Brief, p. 22) She also notes that attaching a scienter requirement to the Wisconsin law makes that statute "more constitutionally palatable." (Respondent's Brief, p. 21)

Professional Discretion

Respondent argues that mandatory reporting requirements applied to physicians and nurses deprive them of the right to professional discretion with the

result that any and all bruises, for example, would have to be reported. While the statute limits the ability of the physician or other professional to make a personal investigation and determination of whether or not abuse has occurred, it does not affect the ability of the medical professional to act within her area of expertise. In her examination of the reasons why medical personnel may fail to report abuse, Jessica Ann Toth Johns identifies a phenomenon which she refers to as "role confusion". [1] "Mandated Voices for the Vulnerable: An Examination of the Constitutionality of Missouri's Mandatory Child Abuse Reporting Statute", 72 UMKC L.Rev. (Forthcoming 2004). "Role confusion" is defined as the feeling on the part of the medical professional that he/she has to prove abuse, "thereby taking on a role that isn't theirs." Johns at p. 34. The testimony of Respondent's witnesses illustrates this phenomenon. (Respondent's Brief, p. 11-12) Dr. Kennetz and Ms. Schaffitzel appear to be of the belief that they must decide themselves whether or not probable cause for abuse exists before they can justify contacting the hotline. In their fear of "unleashing the state's inquisitors", they take upon themselves the role of child abuse investigator. (Respondent's Brief)

[1]This term is used by Dr. Irene Walsh, Section Chief for the Team for Children at Risk and Medical Director for the Child Abuse Team at Children's Mercy Hospital in Kansas City, Missouri.

This arrogation of the investigative role is not required by the statute and is contrary to its purpose. By its express terms, the law requires that the determination of abuse or neglect be turned over to the child abuse professionals at the Division of Family Services, however distasteful that surrender of authority might be to the individual physician or nurse. The same point was made in People v Cavaiani, *op. cit.* The Michigan Court of Appeals rejected the argument by the Defendant, a psychologist, that in the exercise of his professional judgment he might have determined that the patient's story of abuse was a fantasy and thus did not warrant a hotline call. Cavaiani, 432 N.W.2d at 413. The Court responded that "it was not for him" to decide if his suspicions of abuse were in fact true. Cavaiani at 413. By assuming that role, Respondent (and the Defendant in Cavaiani) guaranteed that no other investigation would take place by those specifically designated under the law to conduct those investigations. The Arizona appellate court made the same point in L.A.R. v. Ludwig, 821 P.2d 291, 294 (Ariz. App. 1991) in evaluating the Arizona mandatory reporting law which required a report when there were "reasonable grounds to believe" that abuse had occurred. The Court noted:

> "The statute does not contemplate that a person must fully investigate the suspected abuse before making a report. All the person must do is make a

> report. It is the responsibility of Child Protective Services and the police to investigate the allegations....we do not believe our legislature intended persons with knowledge of alleged child abuse to conduct their own investigations to decide whether enough evidence of abuse exists to warrant a report." (L.A.R. at 295)

If by the term 'discretion' Respondent means the right of the mandated reporter to make her own independent determination of abuse, then she is correct that she does not have that discretion under the law.

The decision as to whether or not reasonable cause exists to suspect abuse is not necessarily a medical decision requiring the application of medical standards. The standard is deliberately set low in order to encourage reporting of abuse or potential abuse before the harm done to the child is severe or irreparable and the recognition of possible abuse does not depend on special training or experience, at least in the first instance. In F.A.,, P.A. and M.N., M.A. & C.A. v. W.J.F. Jr. & S.F., 656 A.2d 43 (N.J. 1994), the Superior Court of New Jersey evaluated the state's statute granting immunity to those who reported suspected child abuse under the State's mandatory reporting statute. Calling child abuse "a problem of devastating proportion", the Court found the statutory language which included the phrase "reasonable cause to believe", to be "clear and unequivocal" (F.A. at 572).

It also cited with approval L.A. R. V. Ludwig, 821 P.2d 291, 293 (Ariz. App. 1991) in which the Arizona appellate court defined "reasonable grounds" in its immunity statute to mean "any facts from which one could reasonably conclude that a child had been abused". (F.A, P.A. at 581). Acknowledging that "reasonable grounds" was a low standard for reporting, the Court also noted that

> "Given the potentially devastating consequences of continued, undetected child abuse, as well as the inherent difficulty in uncovering such cases, State authorities..are concerned with having available procedures to detect abuse or neglect as quickly and accurately as possible. Procedures which uncover abuse after the fact, no matter how accurate, are of little value." [citations omitted] (id)

Not only is the standard deliberately low, but the range of persons included in the statute moves from those with considerable specialized training and experience to those who may have little or none. Section 210.115 RSMo is no longer limited to physicians, nurses or even to persons with any professional training. By including into the statute the broad spectrum of "other person(s) with responsibility for the care of children", it is clear that the legislature intended there to be a minimal standard for compliance, dependent not on medical expertise, but basic common experience. It does not take a medical degree, for example, to understand that

children under five often have bruises which are unrelated to abuse; it simply takes common experience. The standard is that of a "prudent person of reasonable intelligence" confronted with the same circumstances. See, e.g., State v. Edwards, 60 S.W.3d 602, 615 (W.D. 2001) ; Martinez v. State, 24 S.W.3d 10, 20 (E.D. 2000). As noted by the Court in State v. Hurd, reviewing a similar statute to Missouri's:

> "[T]he test becomes whether a prudent person would have had reasonable cause to suspect child abuse if presented with the same totality of circumstances as that acquired and viewed by the defendant. Under this statute, conviction is only permitted when, under the totality of circumstances presented to the defendant, a prudent person would have had reasonable cause to suspect child abuse. State v. Hurd, *op cit.* At 45.

A reasonably prudent person would not feel required to contact the hotline because there would be no 'reasonable cause to suspect' abuse.

Respondent's coworker, Dr. Kennetz, expressed his fear that any and all bruises would have to be reported whether or not there was any reason to suspect that abuse had occurred. But that is not the law. The standard of the reasonable man is an attempt to balance the need for reporting possible abuse against the risk of baseless allegations. In Hughes v. Stanley County School Board, 594 N.W. 2d

346 (S.D. 1999), the Supreme Court of South Dakota considered whether or not a school counselor was justified in failing to report abuse under that state's mandatory reporting law which required a report when there was "reasonable cause to suspect". In that case the Court noted:

> "If the Legislature had deemed it appropriate to require all such reports by children [of sexual abuse] to teachers and school counselors be reported to the school administration, it could easily have done so. The Legislature chose a middle ground by adopting the reasonable cause standard. In doing so it opted to balance competing public interests." (Hughes at 354).

Dr. Kennetz's fears are without any real foundation in the law and may reflect his own unwillingness to become involved in litigation, another reason why medical professionals often fail to report.[2] Johns, p. 33 Such reluctance to be inconvenienced, however, or even distaste for social workers, does not excuse

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[2]The original mandatory reporting laws were specifically geared to physicians in part because of the recognition that physicians, although they were considered to be among those most likely to see abuse, were highly reluctant to recognize child abuse as a reason for physical injuries to children. National Clearinghouse on Child Abuse and Neglect Information, Current Trends in Child Maltreatment Reporting Laws, September 2002.

non-compliance; nor is it sufficient to outweigh the State's "serious apprehension" of child abuse. Just as the ordinary street officer must distinguish between reasonable suspicion and probable cause in making his determinations of when an arrest, rather than mere investigative stop is permissible, so the physician must determine when a prudent person, under all the facts and circumstances known to him, could suspect abuse. He is not required to conduct his own investigation, determine probable cause for abuse, or find the perpetrator guilty before he can contact the hotline to initiate the investigation.

Although Missouri's statutory scheme is broad enough to include a range of expertise and experience, the 'reasonable man' standard does take into account the specialized knowledge, experience and training of the nurse, physician or other medical personnel. Sussman and Cohen in Reporting Child Abuse and Neglect: Guidelines for Legislation 98 (1975) explain the impact of the phrase "reasonable cause" when coupled with "suspect".

> "[A] phrase such as 'reasonable cause' is considered by courts as an 'objective' standard of evidence. That is, the law interprets it as indicating what reasonable men in similar circumstances would believe to be the case, whether or not the individual in question actually formed the belief. This is in contrast to the words 'believe' or 'suspect' which,

> standing alone, denote a 'subjective' standard, or one under which only the protagonist is required to hold the requisite opinion...Where reporting statutes contain the phrase 'reasonable cause to believe' or 'reasonable cause to suspect' a charge could be made against a physician for failing to report if it could be proven that a reasonable physician in similar circumstances would have suspected an abuse even though the doctor in question did not personally form the belief that the child was abused." Sussman and Cohen at 85.

The Missouri statutory mandate is flexible enough to permit differences in levels and types of expertise in those required to report, as well as the myriad of variations in circumstances that could be presented, while still maintaining final responsibility for the determination of abuse with the Division. As noted in Johns, a less flexible approach, which spells out in detail each and every circumstance which could legally constitute abuse, might relieve Dr. Kennetz's burden of reasonableness, but would have exactly the effect of limiting medical discretion that Dr. Kennetz descries. It would also significantly decrease the law's effectiveness in reducing child abuse. Johns at p. 31-32.

CONCLUSION

Respondent's attacks on the constitutionality of the statute are rooted in a

fundamental misconception of the role of the medical professional within the mandatory reporting scheme. She undertakes a role and burden which is not only not required, but actually prohibited under the statute. It is also based on a failure to consider the law in conjunction with other applicable statutes and the relevant caselaw. Although there have been no appellate decisions specifically addressing the issue of vagueness, Missouri's mandated reporter law is based on legal principles which have been addressed many times in other contexts.[3]

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[3] It should be noted that the trial court in its order assumed, without any basis, that the prosecution of Leslie Brown was the first and only such prosecution in Missouri. That is not the case. See, e.g.,State v. Gail Ernick, C94-4754, Circuit Court of Jackson Co., charged 2/04/93; State v. Francis Manley, CR94-4753, Circuit Court of Jackson Co., charged 2/04/93; Cape Girardeau County prosecuted a teacher with failure to report abuse in State v. Thomas Mark Sprandel, Case No. 32R05100529 (2001); and both Christian County and Wayne County *inter alia*, have charged mandated reporters with failure to comply with the statute.

CERTIFICATION

I certify that two copies of the Appellant's Reply Brief were mailed to Thomas D. Carver, Attorney for Respondent, 2103 E. Sunshine Street, Springfield, Missouri 65804 and to Dee Wampler, at 2974 E. Battlefield, Springfield, MO 65804 on this __ day of April, 2004 and further that the brief contains 2,922 words, 366 lines and complies with Rule 84.06(b) of the Missouri Rules of Civil Procedure. I also certify that a copy of the disk was furnished to the Court and counsel for Respondent on a double-sided, high intensity, IBM-PC compatible 1.44 MB, 3 1/2-inch size floppy disk and that the disk has been scanned and is virus free.

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